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No. 92-1149

In the Supreme Court of the United States

OCTOBER TERM, 1992

GLEN MAC MURDOCK, ETC., ET AL., PETITIONERS

v.

UTE DISTRIBUTION CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE SECRETARY OF THE INTERIOR IN OPPOSITION

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QUESTION PRESENTED

Whether this Court's decision in *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128 (1972), which held that the Ute Distribution Corporation is the authorized representative of mixed-blood Utes for purposes of managing indivisible tribal assets, collaterally estops petitioners from relitigating that issue.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-16) is reported at 975 F.2d 683. The opinion of the district court (Pet. App. 17-20) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 9, 1992. On November 30, 1992, Justice White extended the time within which to file a petition for a writ of certiorari to and including January 7, 1993. The petition for a writ of certiorari

was filed on January 5, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves a nearly 25-year-old dispute over which organization, the Ute Distribution Corporation (UDC) or the Affiliated Ute Citizens of the State of Utah (AUC), is the authorized representative of the "mixed-blood Utes" for purposes of managing certain Ute tribal assets.

1. The Act of August 27, 1954 (Ute Indian Supervision Termination Act), ch. 1009, 68 Stat. 868, 25 U.S.C. 677-677aa, pertained to the Ute Indian Tribe of the Uintah and Ouray Reservation in Utah. Section 1 of the Act stated its purpose: "to provide for the partition and distribution of the assets of the * * * Tribe * * * between the mixed-blood and full-blood members thereof; for the termination of Federal supervision over the trust, and restricted property, of the mixed-blood members of said tribe; and for a development program for the full-blood members thereof, to assist them in preparing for termination of Federal supervision over their property." 25 U.S.C. 677. Section 6 of the Act authorized the mixed-blood Utes to organize, to adopt a constitution and bylaws, and to provide, by that constitution, for the selection of authorized representatives with power "to take any action that is required by [the Act] to be taken by the mixed-blood members as a group." 25 U.S.C. 677e. Section 10 of the Act stated that after the final membership roll of the mixed-blood and full-blood groups had been published, the Tribal Business Committee, representing the full-bloods, and the authorized representative of the mixed-bloods would

commence division of the assets of the Tribe that were susceptible to equitable and practicable distribution. 25 U.S.C. 677i. A portion of the tribal assets—including gas, oil, and mineral rights, and unadjudicated or unliquidated claims against the United States—were classified as "not susceptible to equitable and practical distribution." 25 U.S.C. 677*o*(a). These "indivisible" assets were to be "managed jointly by the Tribal Business Committee and the authorized representatives of the mixed-blood group." 25 U.S.C. 677i.

2. The mixed-blood Utes' "authorized representative" for purposes of the indivisible tribal assets was initially the AUC, an unincorporated association. The AUC delegated its authority to the UDC in 1959. The UDC issued ten shares of stock to each member of the mixed-blood group to represent his or her interest in the indivisible tribal assets. Pet. App. 3-4. A number of mixed-blood Utes subsequently sold their shares at prices later determined to be substantially lower than the stock's actual value. Those transactions gave rise in 1968 to two lawsuits.

In *Reyos* v. *United States*, 85 mixed-blood Utes sued a bank that had acted as transfer agent for the shares of UDC stock, as well as two of the bank's officers. The *Reyos* plaintiffs argued that the bank and its officers had violated securities laws by encouraging mixed-blood Utes to sell their UDC stock at disadvantageous prices. The United States was later added as a defendant when the plaintiffs alleged that the government had breached a trust obligation by failing to oversee the plaintiffs' improvident sales of the UDC stock and to prevent

fraud in connection with those sales. The district court held for the plaintiffs in their suit against the bank and its officers, and also found the United States liable for breaching a duty to the plaintiffs. The court of appeals reversed in part and remanded. It found the bank and its officers liable, but to a lesser extent than the district court had found. The court of appeals held that the United States was not liable, concluding that it owed no duty to the plaintiffs in connection with their sales of stock. *Reyos* v. *United States*, 431 F.2d 1337 (10th Cir. 1970); see *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 140-141 (1972).

While the *Reyos* case was pending in the district court, the AUC filed the *Affiliated Ute Citizens* case against the United States. In *Affiliated Ute Citizens*, the AUC sought: (1) pro rata distribution to the individual members of the mixed-bloods' percentage share of the indivisible mineral estate underlying the Reservation; and (2) a declaration that the AUC and not the UDC was the authorized representative of the mixed-blood Utes for purposes of managing the indivisible assets jointly with the Tribal Business Committee. The United States filed a motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim. The district court granted that motion, and the Tenth Circuit affirmed. *Affiliated Ute Citizens* v. *United States*, 431 F.2d 1349 (1970); see *Affiliated Ute Citizens*, 406 U.S. at 139-140.

On petitions for a writ of certiorari, this Court granted review in both *Reyos* and *Affiliated Ute Citizens* and consolidated the cases for argument and decision. 406 U.S. at 141. The Court affirmed the

Tenth Circuit's ruling in *Affiliated Ute Citizens* that the AUC's action against the United States for outright distribution of the mixed-bloods' percentage of the mineral estate "was properly dismissed for want of jurisdiction." *Id.* at 143. This Court then considered the AUC's contention that it (rather than the UDC) was the mixed-bloods' authorized representative for purposes of managing the mineral interest with the Tribal Business Committee. The Court concluded: "Clearly, it is UDC and not AUC that is entitled to manage the oil, gas, and mineral rights with the committee of the full-bloods." *Id.* at 144. In the *Reyos* case, as to the claim against the United States, the Court affirmed the decision of the court of appeals that the United States had no duty to the plaintiffs regarding their sales of the stock. *Id.* at 149-150. The Court also affirmed the court of appeals' holding that the bank and its officers were liable for violation of the securities laws, *id.* at 150-154, although, disagreeing with the court of appeals, it reinstated the district court's award of damages based on a valuation of UDC stock at $1500 per share, *id.* at 154-157.

3. In 1989, petitioners AUC, Glen Mac Murdock, Jr. (a mixed-blood Ute and AUC member), and Mac Eugene Murdock (Glen's son, who is not a mixed-blood Ute and consequently not an AUC member) filed suit against the Tribe, the UDC, and the Secretary of the Interior. They sought various relief, including a declaratory judgment that the AUC, and not the UDC, was the authorized representative of the mixed-blood Utes for purposes of managing the indivisible tribal assets. The UDC and the Secretary

contended that collateral estoppel prevented petitioners from relitigating the authorized-representative issue. Pet. App. 3-4, 13 & n.6. The district court agreed and dismissed the suit. Pet. App. 17-20.

The court of appeals affirmed. Pet. App. 1-16. It first identified and analyzed each of the four elements necessary to establish collateral estoppel: (1) the issue previously decided is identical with the one presented in the action in question; (2) the prior action was finally adjudicated on the merits; (3) the party against whom the doctrine is invoked was a party, or is in privity with a party, to the prior adjudication; and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action. Pet. App. 8; see Pet. App. 8-16. The court then concluded: "The Supreme Court's decision in *Affiliated Ute Citizens* v. *United States* meets the four elements for collateral estoppel that our precedent requires. The decision held that the UDC, and not the AUC, was the entity 'entitled to manage the oil, gas, and mineral rights with the committee of the full-bloods.' Thus, the doctrine of collateral estoppel precludes [petitioners] from relitigating that issue." Pet. App. 16 (citation omitted).

ARGUMENT

Petitioners contend (Pet. 11-21) that this Court's decision in *Affiliated Ute Citizens/Reyos* does not collaterally estop them from seeking a declaratory judgment that the AUC is the authorized representative of the mixed-blood Utes for purposes of managing

indivisible tribal assets.[1] The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore unwarranted.

1. Petitioners first contend (Pet. 11-12) that the issue they raise in this case is not the same issue decided by this Court in *Affiliated Ute Citizens/Reyos*. That contention is without merit.

In the district court, petitioners sought a declaratory judgment that "the plaintiff AUC, and not the UDC, is the authorized representative of the mixed blood Utes for purposes of the 'joint management' of indivisible assets of the Ute Indian Tribe." Pet. App. 9. In the *Affiliated Ute Citizens/Reyos* litigation, the AUC instituted suit against the United States seeking "a determination that AUC is entitled to participate in management with the business committee of the full-bloods." 406 U.S. at 141. This Court decided that issue by concluding that "[c]learly, it is UDC and not AUC that is entitled to

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[1] The petition presents only the issue whether this Court's decision in *Affiliated Ute Citizens/Reyos* bars petitioners from relitigating the authorized-representative issue. See Pet. i. We note, however, that the district court held that a number of other decisions had also resolved that issue and bar petitioners from relitigating it. See Pet. App. 19; see also, *e.g.*, *Maldonado* v. *Hodel*, 977 F.2d 596 (10th Cir. 1992) (Table), aff'g 683 F. Supp. 1322 (D. Utah 1988); *United States* v. *Felter*, 752 F.2d 1505 (10th Cir. 1985). Because it found that this Court's decision in *Affiliated Ute Citizens/Reyos* precludes petitioners from relitigating the issue, the court of appeals did not address the preclusive effect of those other decisions. See Pet. App. 4 n.3.

manage the oil, gas, and mineral rights with the committee of the full-bloods." *Id.* at 144. The court of appeals thus correctly concluded that "[t]he issue [petitioners] are attempting to litigate is the same as the one addressed previously by the Supreme Court." Pet. App. 9.

2. Petitioners next contend (Pet. 12-13) that this Court did not finally adjudicate the authorized-representative issue in *Affiliated Ute Citizens/ Reyos* because resolution of that issue was unnecessary to the judgment. See *Block* v. *Commissioners*, 99 U.S. 686, 693 (1879). That contention is erroneous for two independent reasons.

a. This Court's decision in *Affiliated Ute Citizens/Reyos* had two distinct components—the portion addressing the *Affiliated Ute Citizens* litigation and the portion addressing the *Reyos* litigation. See 406 U.S. at 141-144, 144-154; Pet. App. 11 ("The Court did not decide *Affiliated Ute* alone, however, but rather considered it along with *Reyos*."). In order to resolve the securities claims against the bank and its officers in the *Reyos* portion of the case, it was necessary for this Court "to determine whether the UDC was the mixed-blood Utes' authorized representative." Pet. App. 11. As the court of appeals explained (Pet. App. 11-12):

> The Supreme Court concluded that the bank and two of its officers had violated the securities laws and that the district court had properly computed damages. In order for the Court to evaluate the issue of damages for loss of the UDC stock, the court had to conclude that the stock was validly issued and had to determine the fair value of that

> stock. The district court had assessed the value of the UDC stock based on the assets held by the corporation, namely, the mineral rights, the unliquidated and unadjudicated claims against the United States, and all other indivisible tribal assets. Revenue[s] from such assets were determined to be payable to the UDC and ultimately to be disbursed as dividends to the UDC stockholders. The Tenth Circuit had remanded for a recomputation of damages, but the Supreme Court concluded that the record supported the district court's finding on damages and therefore reinstated it. To reach this conclusion, the Supreme Court also had to conclude that the assignment of the indivisible assets to the UDC was proper, for if it were improper, the UDC would have no rights with regard to the indivisible tribal assets, and the stock it issued would have been worthless.

The court of appeals thus correctly recognized that resolution of the authorized-representative issue "was a necessary part of the Court's decision in the *Reyos* portion of its opinion." Pet. App. 9-10.

b. Moreover, in deciding the *Affiliated Ute Citizens* aspect of the case, this Court considered two separate issues: (1) the AUC's claim that the United States was required to distribute to the mixed-blood Utes their "percentage of the mineral estate"; and (2) the AUC's request for a declaration that "AUC is entitled to participate in management with the business committee of the full-bloods." 406 U.S. at 141. On the first issue, the Court noted that the district court did not have jurisdiction to entertain a suit in which a plaintiff sought property (or money)

from the United States unless the United States had consented to the suit. *Id.* at 141-143. Finding no such consent, the Court ruled that there was no jurisdiction to entertain that claim. *Id.* at 143.

With respect to "AUC's prayer for a determination as to management rights," 406 U.S. at 143, however, the Court reached the merits and concluded that "[c]learly, it is UDC and not AUC that is entitled to manage the oil, gas, and mineral rights with the committee of the full-bloods." *Id.* at 144. The Court did not address the jurisdictional basis for deciding that question. Contrary to petitioners' assertions (Pet. 6, 12-13), however, that omission does not mean that the Court implicitly believed it had no jurisdiction to consider the issue, and nevertheless proceeded to address it in dicta. In fact, the more logical explanation is that the Court believed it had jurisdiction to decide "AUC's prayer for a determination"—a declaratory judgment—"as to management rights," 406 U.S. at 143, just as petitioners necessarily contend in this case that the district court has jurisdiction to determine the same issue. See Pet. App. 18. In sum, this Court in the *Affiliated Ute Citizens* portion of the case did decide that "it is UDC and not AUC that is entitled to manage the oil, gas, and mineral rights with the committee of the full-bloods," 406 U.S. at 144, and its decision on that issue was necessary to dispose of the AUC's request for a determination of that very issue.

3. There is no merit to petitioners' assertion (Pet. 13-15) that they are not in privity with the plaintiffs in *Affiliated Ute Citizens/Reyos*. First, the claim of the individual petitioners is derivative of the claim of

the AUC. "To the extent that Glen Mac Murdock would benefit if relief were obtained, he would do so only in a derivative capacity owing to his status as a member of the AUC." Pet. App. 13. That conclusion follows from the fact that "[i]f the courts were to declare the AUC the mixed-blood Utes' authorized representative, the AUC could then provide benefits (in whatever form) from the indivisible tribal assets to its members." *Ibid.*[2]

Second, the AUC was a party to the *Affiliated Ute Citizens* litigation, and thus is bound by that decision. Moreover, even assuming this Court's conclusion that the UDC was the mixed-bloods' authorized representative was unnecessary to the decision in *Affiliated Ute Citizens*, that does not advance petitioners' cause because the AUC is in privity with the plaintiffs in the *Reyos* case. As the court of appeals explained:

> The AUC sponsored the companioned *Reyos* case. All the plaintiffs in the *Reyos* case were members of the AUC. The AUC brought the *Affiliated Ute* case to provide an alternative remedy to the damages it viewed as inadequate in the *Reyos* case. The same attorneys represented the petitioners in both cases before the Supreme

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[2] Petitioner Mac Eugene Murdock, the son of Glen Mac Murdock, is not a member of the AUC. However, to the extent Mac Eugene Murdock would not benefit from a declaratory judgment that the AUC is the legitimate representative of the mixed-blood Utes, he has no standing to raise that issue. To the extent he would benefit from a judgment in favor of petitioners, he is precluded to the same extent as his father. Pet. App. 13 n.6.

> Court and filed a single brief. The AUC cannot now argue that its interests were not adequately represented during the *Reyos* litigation. Where an organization brings litigation in the name of individuals but retains "effective control", "[o]rdinary principles of preclusion by participation and control suggest that the organization should be subject to issue preclusion in later litigation."

Pet. App. 14 (quoting 18 C. Wright & A. Miller, *Federal Practice and Procedure* § 4456, at 492 (1981)). Accordingly, the court below properly concluded that the AUC is in privity with the plaintiffs in the *Reyos* case.

4. Finally, the court of appeals properly rejected petitioners' contention (Pet. 16-21) that they did not have a full and fair opportunity to litigate the authorized-representative issue in *Affiliated Ute Citizens/Reyos*. The AUC raised the authorized-representative issue in its complaint in *Affiliated Ute Citizens*. Pet. App. 15. In this Court, the AUC briefed the issue *and* asked the Court to decide it. *Ibid.* And the Court did decide it. 406 U.S. at 144. Clearly, then, the AUC extensively litigated the authorized-representative issue during the course of the *Affiliated Ute Citizens/Reyos* case. The AUC's real objection at this point is that this Court resolved the issue against the AUC. See Pet. App. 15-16 ("In fact, the AUC does not object to the Supreme Court's addressing the issue; rather, it objects only to the fact that the Supreme Court resolved the issue against it."); see also Ute Indian Tribe Amicus Br. App. B (reproducing rehearing petition filed by the AUC and Reyos in this Court, which argued that the

Court erred in its resolution of the authorized-representative issue but did not argue that the Court did not or should not have resolved the issue).[3] But

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[3] Petitioners submit that this Court's decision on the authorized-representative issue was erroneous because the Court made a factual mistake regarding formation of the UDC. Pet. 16-21. Even assuming petitioners could avoid collateral estoppel, their contention is incorrect on the merits. After the UDC was formed in 1958 to manage mineral rights and unadjudicated claims against the United States jointly with the Tribal Business Committee, the AUC delegated authority to the UDC by Resolution No. 59-8 (Jan. 7, 1959). The delegation from AUC in Resolution No. 59-8 authorized the UDC "to receive, manage, distribute or otherwise handle assets of the mixed-blood members of the Ute Indian Tribe of the Uintah and Ouray Reservation." The Court's ruling in *Affiliated Ute Citizens/Reyos* on the delegation of authority from the AUC to the UDC was thus correct. Moreover, contrary to petitioners' intimation (Pet. 16-17), this Court did not state that formation of the UDC was approved by the members at a tribal meeting on July 14, 1956. In any event, even if this Court had believed that formation of the UDC was approved by the members in 1956, that mistake was irrelevant to the Court's analysis. In the section of the opinion rejecting the AUC's claim that it was the authorized representative, the Court never mentioned or cited the meeting of July 14, 1956, or Resolution No. 56-66 (August 13, 1956) (reproduced at Pet. App. 46-47), which arose out of that meeting. See 406 U.S. at 143-144. The Court instead discussed and relied on the facts that the "UDC was formed by mixed-bloods in 1958 specifically to manage mineral rights and unadjudicated claims against the United States jointly with the business committee," and that the "AUC approved UDC's articles and by resolution delegated authority to UDC to act in accord with those articles." *Id.* at 143. Petitioners do not challenge those factual statements by the Court, which were the basis for its ultimate legal conclusion that "[c]learly, it is UDC and not AUC that is entitled to manage the oil, gas, and

that, of course, is not a basis for avoiding the doctrine of collateral estoppel. The court of appeals correctly concluded that "the AUC had a full and fair opportunity to litigate its status as the mixed-blood Utes' authorized representative for purposes of the indivisible tribal assets." Pet. App. 16.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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mineral rights with the committee of the full-bloods." *Id.* at 144.